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In Reply Refer to:
3120 (930 NNV)

CERTIFIED MAIL—RETURN RECEIPT REQUESTED

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DECISION

: December 14, 2017
: Competitive Oil and Gas
: Lease Sale

PROTEST DENIED

On October, 11, 2017, the Bureau of Land Management Eastern States Office (BLM ES) received a protest timely filed on behalf of the above cited parties (Protesters) disputing the inclusion of five Ohio¹ parcels (Ohio Parcels) in the BLM ES December 14, 2017 Competitive Oil and Gas Lease Sale (December Lease Sale). For the reasons stated below, the protest is hereby denied.

BACKGROUND

Parcel Review

The Ohio Parcels were nominated for BLM ES' consideration to lease by interested parties in accordance with 43 CFR §3120.3. Subject Parcels include unleased federal mineral estate administered by BLM, and within the jurisdiction of the U.S. Forest Service (USFS). Following BLM ES' preliminary adjudication of ownership and availability of minerals, Subject Parcels were forwarded to the Northeastern States District (NSD) for review of environmental concerns, including interdisciplinary analyses and field visits, in compliance with the *National Environmental Policy Act of 1969* (NEPA) and other environmental laws, as well as BLM's national policy codified in BLM manuals, handbooks, and Instruction Memorandums, as further discussed below.

¹OHES 058308, OHES 058309, OHES 058310, OHES 058311, OHES 058312.

When BLM seeks to issue oil and gas leases for acquired lands managed by the U.S. Forest Service (USFS) such as the Subject Parcels, the Federal Onshore Oil and Gas Leasing Reform Act (FOOGLRA) requires consent from the USFS prior to leasing, as well as USFS input on necessary stipulations (30 U.S.C. § 226(h)). Accordingly, NSD's review included a request for USFS inspection of the proposed parcels, consent to ensure leasing of the parcels would be in conformance with the applicable Forest Plan decisions, and the receipt of consent to offer the described parcels, as further discussed below.

National Environmental Policy Act Analysis

In compliance with NEPA, BLM undertook an Environmental Analysis (EA) to determine whether oil and gas leasing within 40,000 acres of the Marietta Unit, Wayne National Forest could occur with no significant environmental impact, or if a more in depth environmental impact statement would be required prior to offering of Subject Parcels. The NSD conducted site visits on October 26 and 27, 2015 within portions of the Marietta Unit. The NSD also evaluated potential effects: Air Resources/Climate Change, Plant and Animal Habitat/Populations; Geology and Mineral Resources; Soils; Water Resources/Water Quality; Wastes (Hazardous or Solids); Public Health and Safety; Transportation; Land Use and Recreation; Noise; Cultural Resources/Paleontology; Native American Religious Concerns; Visual Resources/Scenic Quality; Socioeconomics and Environmental Justice; and Cumulative Impacts. As further discussed below, during the EA process, NSD incorporated the 2005 Biological Opinion (BO) prepared for the 2006 Forest Plan and Final Environmental Impact Statement (2006 FP/FEIS), and finding no potential significant impact to the Wayne National Forest from future and current oil and gas development, as well as a 2016 Biological Opinion (BO) prepared to evaluate potential impacts to specific bat species of activities such as oil and gas development.

In November 2015, the BLM also created a project website for the Marietta EA to provide the public links to documents, additional project information and comment opportunities, including methods for comment submission, maps and EOI information. The website is accessible through the BLM National NEPA Register². On April 28, 2016, the draft Marietta EA was posted on the project website in accordance with applicable BLM Manual and Handbook 3120 Competitive Leasing and Washington Office IM No. 2010-117. As a result of the public review period, the BLM received approximately 13,700 comments by email and 480 comments by U.S. postal service or FedEx. Approximately 300 comments were identified as substantive in accordance with NEPA. Public comments were addressed by either expanding existing sections of the EA, providing clarification, or adding additional information. On October 14, 2016, BLM posted EA DOI-BLM-Eastern States-0030-2016-0002-EA, Oil and Gas Leasing, Wayne National Forest, Marietta Unit of the Athens Ranger District (Marietta EA). The changes made to the draft Marietta EA are summarized in a comment matrix attached as Appendix A in the Marietta EA.

In accordance with *BLM National Environmental Policy Act Handbook H-1790-1* (NEPA Handbook), *Section 6.2.1*, NSD developed a purpose and need statement early on in the environmental review, and utilized said statement to dictate the scope of the Marietta EA. The Marietta EA describes its purpose and need as follows (Page 16):

The purpose of the Proposed Action is to support the development of oil and natural gas

² https://eplanning.blm.gov/epl-front-office/eplanning/nepa/nepa_register.do

resources that are essential to meeting the nation's future needs for energy while minimizing adverse effects to natural and cultural resources. The BLM minimizes adverse effects to resources by identifying appropriate lease stipulations and notices, best management practices, and mitigations. It is the policy of the BLM as mandated by various laws, including the Mineral Leasing Act of 1920, as amended (30 United States Code [USC] 181 et seq.), the Federal Land Policy and Management Act of 1976 (FLPMA), and the Energy Policy Act of 2005 to make mineral resources available for development to meet national, regional, and local needs. The oil and gas leasing program managed by the BLM encourages the sustainable development of domestic oil and gas reserves which reduces the dependence of the United States on foreign sources of energy as part of its multiple-use and sustainable yield mandate.

The leasing of federal minerals is vital to the United States as it seeks to maintain adequate domestic production of this strategic resources. Industry uses the BLM EOI process to nominate federal minerals for leasing. The Proposed Action is consistent with the BLM's mission and requirement to evaluate nominated parcels and hold quarterly competitive lease sales for available oil and gas lease parcels.

Under Section 102(2)(E) of the Federal Land Policy and Management Act (FLPMA), and 40 CFR 1508.9(b), BLM is required to "include brief discussions...of alternatives" used in the environmental analysis to determine the best means of mitigating environmental impacts while satisfying the purpose and need of the proposed action. The Marietta EA considered two alternatives in detail (Pages 21-29):

Alternative 1- No Action Alternative

Under the No Action Alternative, the BLM would not offer federal minerals in the Marietta Unit for oil and gas leasing, including both the parcels requested in currently pending EOIs and all other federal minerals in the Marietta Unit. Without a lease (No Action Alternative), operators would not be authorized to access federal minerals at the time of development but could develop adjacent privately owned minerals, potentially resulting in drainage of federal minerals without benefit to the government.

Alternative 2- Lands Available for Leasing Alternative

Under this alternative, the Bureau of Land Management (BLM) proposes to make available for lease up to approximately 40,000 acres of federally-owned mineral estate located in the Marietta Unit of the Athens Ranger District, Wayne National Forest, in Monroe, Noble, and Washington Counties in Ohio. This approximate acreage represents the total amount of federally-owned minerals that could be nominated and potentially be made available for leasing on the Marietta Unit. Although this EA analysis assumes that both oil and gas may be produced in the future within the Marietta Unit, natural gas is more likely to be produced.

Furthermore, the Marietta EA considered, but eliminated from detailed analysis, additional alternatives (Page 29):

Offer all leases with a no-surface-occupancy stipulation

Offering all leases with a no-surface-occupancy (NSO) stipulation was suggested through public comment. However, this alternative would not fulfill the purpose and need described in Chapter 1. This alternative would unnecessarily constrain oil and gas occupancy, especially in this highly fragmented landscape, where the ability to cross federal land may be critical to enabling an operator to develop. A No Surface occupancy stipulation has been incorporated for all slopes in excess of 55 percent and a Controlled Surface Use stipulation applies to slopes between 35 and 55 percent.

Lease minerals for vertical drilling only

Offering all leases with a vertical drilling only stipulation was suggested through public comment. However, this alternative would not fulfill the purpose and need described in Chapter 1. A vertical drilling only stipulation would likely result in far greater surface disturbance as more wells would likely be drilled, and result in the least efficient extraction of Federal minerals. The rule of capture is an oil and gas doctrine that allows one to produce oil and gas from their lands even though said oil and gas flows from the lands of their neighbors. In Ohio, the rule of capture entitles landowners to "offset" wells, or wells that do not need to conform with state conservation standards, when one's neighbor is draining their mineral interest. Second, a vertical drilling only alternative is equivalent to a ban on directional drilling, which in turn would be tantamount to a ban on development of the Utica, Marcellus, and other tight formations underlying the forest. Such tight formations require horizontal drilling to extract trapped oil and gas.

Through the analysis in the 2006 Forest Plan/Final Environmental Impact Statement (2006 FP/EIS), as reaffirmed in light of the 2012 Supplemental Information Report (2012 SIR), Marietta EA, the NSD determined the Subject Parcels were appropriate for leasing and what mitigation measures (stipulations) should be applied to the leases for the protection of natural and cultural resources. On October 14, 2016, a FONSI was signed by the NSD District Manager documenting BLM's determination that oil and gas development may occur without significant impact, and thus, no EIS is required to offer Subject Parcels for lease.

Protesters' Standing

The BLM received a protest letter from the groups listed above, on October 11, 2017. In the Protest Letter (Pages 1-52), the groups provided a summary of their organizations' general objectives and list of affiliates from Heartwood, Sierra Club, Athens County Fracking Action Network, and Buckeye Environmental Network were provided without signatures.

None of the parties have provided to the BLM "colorable allegations of an adverse effect, supported by specific facts, set forth in an affidavit, declaration, or other statement of an affected individual, sufficient to establish a causal relationship between the approved action and the injury alleged" (183 IBLA 97, 107). These groups come to establishing allegations of all adverse effects are general claims of use of the Wayne National Forest from some members. However, it is not clear whether this statement establishes Protesters as a party to the case and as having a legally cognizable interest that would be adversely affected by the BLM's decision to issue any of the protested leases.

Nonetheless, given the BLM's directions to the public in the Sale Notice regarding submittal of protests, and the lack of specific agency guidance for adjudicating when an individual or group may have standing to protest lease parcels, the BLM has decided to answer the specific arguments made by the Protesters. However, the BLM does so with the reservation that the Protesters may not have standing to bring an appeal of this protest decision to the IBLA.

DISCUSSION

BLM has identified the substantive arguments from the Protest Letter as to why the Subject Parcels should not be offered at the December Lease Sale. The following is a discussion of the specifics as to the Protesters' arguments, as well as BLM ES' responses.

A. The Programmatic EA fails to consider the potential for new federal leasing to open up private minerals and private surface to horizontal drilling

Protesters argue that "leasing federal minerals would open up substantial private minerals and private surface for development, and is geared towards that end, but BLM failed to clearly disclose these effects" (Pages 5-16). However, BLM addresses the potential opening up private minerals for oil and gas development throughout the Marietta EA. The Marietta EA states (Page 121):

Leasing federal minerals within the Marietta Unit may lead to additional future mineral development on private land and private minerals within the area. Although federal oversight of mineral development on federal land/federal minerals is more stringent than on private land/private minerals, there are numerous state laws and regulations in place. Appendix C of this EA summarizes the laws and regulations that govern mineral development activities on private land in Ohio.

Also, the Marietta EA describes the inclusion of private mineral development analysis in the Reasonable Foreseeable Development Scenario RFDS (Page 24):

...this EA analysis covers the potential impacts of future oil and gas development on both the USFS lands and on adjacent private lands within the Marietta Unit to allow for maximum NEPA flexibility and coverage in case conditions should change in the future.

Furthermore, the Marietta EA explicitly states that existing private development is considered in the cumulative analysis (Page 121):

...the cumulative effects analysis also considers recent past, ongoing, and reasonably foreseeable mineral development (private and federal) within the Marietta Unit. As of 2015, there were 285 federal wells in Washington County, 117 federal wells in Monroe County, and none in Noble County. There were a total of 790 active wells on private lands in the Wayne National Forest.

Addressing concerns about potential environmental impact of private development, the Marietta EA states:

...if some development were to occur on privately owned surface federal and state regulations do exist in order to address any potential concerns regarding contamination or spills. However, if the development occurs on private lands and pipelines or well

development reaches federal minerals, the BLM would ensure that the construction of such well is in compliance with all applicable safety standards

Furthermore, the Marietta EA responds to comments regarding private development as indicated in the Public Comment Matrix (Appendix A, Page 161), and further elaborated upon in Appendix C (Page 195).

Therefore, Protesters arguments as to BLM failure to consider development on private surface are denied.

B. The EA fails to address a host of environmental impacts associated to fracking

Protesters argue that “the EA fails to analyze numerous impacts related to fracking, including potential threats to human health and safety, such as carcinogenic, developmental, reproductive, and endocrine disruption effects, air quality, risks to water resources, and seismic risk” (Pages 16-24). However, hydraulic fracturing is just a single aspect of overall oil and gas development, which has been analyzed throughout the Marietta EA.

The Marietta EA considers impacts to public health and safety of oil and gas development, including the use of hydraulic fracturing, in depth. As to public health and safety effects, the Marietta EA states that (Page 7):

No direct effects from leasing. From future reasonably foreseeable development, effects include potential exposure to contamination that may cause health conditions in sensitive or susceptible populations. However, federal, state, and local regulations, as well as health standards and protocols ensure that potential operations do not compromise public health and safety.

The Marietta EA discusses the mitigating measures that would be attached to any potential lease, which led to this determination that oil and gas development may occur without significant environmental impacts (Pages 65-66):

The 2006 Forest Plan/EIS identifies standards for mineral development that the WNF implements to provide a healthy and safe environment for people and wildlife. Some examples are:

- SFW-MIN-2: Require that all proposed surface-disturbing mineral activities have an approved operation and reclamation plan before the activity begins;
- SFW-MIN-3: Require that operators conduct activities and maintain equipment to prevent the discharge of oil or brine onto the ground or into surface waters;
- SFW-MIN-4: Upon discovery or notification of an accidental spill of crude oil or brine that discharges, or threatens to discharge, into surface waters, notify the Ohio Environmental Protection Agency Emergency Response and Special Investigations unit in Columbus; and
- SFW-SAFE-19: Any wastewater that originates from oil and gas operations would be considered non-federal and so disposal would not be allowed on Wayne

National Forest lands (including the roads under jurisdiction of the WNF). In addition, the Ohio Revised Code only allows for four different disposal methods of fluids associated with oil and gas operations: injection, surface application (on roads only, and only when permitted by the authority with jurisdiction over the road), enhanced recovery (reuse of the fluids in other wells) or other methods to test new technologies and methodologies (ORC 1509.22(C)(1)).

Furthermore, the law specifically states that no one is allowed to place fluids associated with oil and gas operations in surface or groundwater or in or on the land in amounts that cause or could cause pollution of water used for human or domestic animal consumption or damage/injury to public health and safety or the environment (ORC 1509.22).

Other provisions for employees and the public that provide for safety within the WNF include:

- SFW-SAFE-17: Post warnings of dangerous conditions and threats of immediate concern for the safety of Forest employees and the public; and
- SFW-SAFE-18: Issue closure orders to protect the public when clear and present dangers cannot be mitigated in a timely manner.

The Division of Oil and Gas Resource Management (DOGRM) within Ohio's Department of Natural Resources (DNR) maintains an electronic database with information needed in the case of an emergency situation that poses a threat to public health, safety or the environment. Minimum information required is that which is also required for the Emergency Planning and Community Right-To-Know Act regulations (ORC 1509.23(B)). Amended Substitute Senate Bill 315 was signed into law by the Governor on June 11, 2012. This bill amends Ohio Revised Code to require the owner of a well to provide emergency responders with the exact chemical composition of all fluids used in the drilling and stimulating of a well. Exact composition of each proprietary component is made available upon request from emergency responders (Amended ORC 1509.10(H)).

As detailed in pages 8-10 of this letter, BLM included a robust air quality analysis in the Marietta EA. The Marietta EA determines the following as it relates to the effects on air quality from potential oil and gas leasing and development (Page 6):

No direct effects from leasing. Effects can be expected from emissions associated with potential future construction activities and well completion, including National Ambient Air Quality Standards (NAAQS) criteria contaminants and hazardous air pollutants. Effects from emissions may include health hazards, reduced visibility, and contribution to global greenhouse gas emissions. Effects minimized by Standard Operating Procedures (SOPs), best management practices (BMPs) and conditions of approval (COAs) at the time of drilling.

The Marietta EA adequately analyzes the current state, and potential impacts, on water resources related to the proposed action. The Marietta EA states as to the effects to water resources and quality from potential oil and gas leasing and development (Page 6):

No direct effects from leasing. Potential for large surface water withdrawals for drilling

and completion associated with potential reasonably foreseeable future development. Some risk of chemical spills and erosion from roads and well pads. Future reasonably foreseeable effects minimized by USFS policies for water withdrawal and waterway protection and soil conservation measures. Additional protections required by the Onshore Orders.

The Marietta EA goes on to acknowledge (Page 105):

While the act of leasing federal minerals would produce no impacts to surface water quality, subsequent exploration and development of the lease parcels have the potential to produce impacts. The potential effects to surface water from reasonably foreseeable mineral development include sediment loading of stream channels due to the erosion associated with site development or operational transport and introduction of pollutants, toxic chemicals, sediment or debris, via spills and releases to surface water from oil/produced water treatment, storage tanks, handling and sanitary facilities or oil/produced water transportation mediums (trucks or pipelines).

Specifically, the Marietta EA addresses concerns regarding withdrawals of water for oil and gas operations (Page 106):

The BLM and USFS would not approve water withdrawals that would draw down a surface waterbody to the extent that aquatic life would be measurably adversely impacted, for example, by dewatering a stream enough to entrap fish or expose mussels to dry conditions in a stream that would normally have perennial flow.

As to local aquifers and groundwater, the Marietta EA states (Page 106):

Local aquifers (within the Marietta Unit) do not yield sufficient water to support industrial activities within the Marietta Unit. Therefore, the likelihood that the proposed leasing action and potential future mineral development would affect groundwater quantity is negligible.

However, the Marietta EA does acknowledge potential environmental concerns to water resources, as well as mitigating measures (Page 106):

Future mineral development activities would pose some risk of accidental spills of drilling fluids, produced water, and other chemicals (see also Section 4.7, Wastes, Hazardous or Solid). This risk would be minimized by the requirement, described in the 2012 SIR, for operators to use tanks, instead of open pits, to hold all fluids other than fresh water... The only areas where a spill would pose an unacceptable risk to groundwater quality are designated wellhead protection areas or certain locations within the Ohio River and Little Muskingum River floodplains (Thompson, 2012). Other locations throughout the Marietta Unit tend to have low groundwater pollution potential due to low hydraulic conductivity and depths of groundwater (around 200 feet or less from the surface). Drilling to a production zone that is below a potable water-bearing formation poses the risk of allowing brine and other chemicals to migrate up into a potable water zone. This risk is mitigated in federal wells by casing and cementing requirements in Onshore Oil and Gas Order Number 2.

Finally, the Marietta EA adequately addresses potential seismic activity from the proposed oil and gas leasing, and potential development. As to the current state of seismic activity in the geographic

region, the Marietta EA states (Page 55):

Ohio ranks 28th amongst the 50 states in seismic activity with 8 earthquakes (3.5 or above) between 1974 and 2003. Geologic mapping and 2-D and 3-D seismic data can locate faults within the area but current science may not be able to differentiate a “natural” earthquake from an earthquake induced by fluid injection.

As to the specific seismic impacts of potential oil and gas development, and specifically hydraulic fracturing, the Marietta EA states (Page 103):

A study conducted by the National Academy of Sciences examined the issue of induced seismic activity from energy development. As a result of the study, they found that: (1) the process of hydraulic fracturing a well as presently implemented for shale gas recovery does not pose a high risk for inducing felt seismic events; and (2) injection for disposal of wastewater derived from energy technologies into the subsurface does pose some risk for induced seismicity, but very few events have been documented over the past several decades relative to the large number of disposal wells in operation (National Academy of Sciences, 2012). On April 11, 2012, the Deputy Secretary of the United States Department of the Interior, David Hayes, stated that scientists have been investigating the recent increase in the number of earthquakes in the United States to determine whether there is scientific evidence of a link between unconventional oil and gas production and seismic activity. The preliminary findings did not suggest that HF caused the increased rate of earthquakes. Instead, “at some locations the increase in seismicity coincides[d] with the injection of wastewater in deep disposal wells” (Hayes, D. J., 2012).

Also discussed are the measures that the State of Ohio has taken to prevent seismic activity resulting from oil and gas operations. The Marietta EA states (Page 104):

The ODNR now requires operators drilling within three miles of a known fault or area of seismic activity greater than 2.0 to install seismometers. If seismic activity above 1.0 is detected, work must pause while the seismic activity is investigated, and work must stop if the investigation reveals a probable connection to the drilling operation. This regulation would affect drilling primarily in the southern half of the Marietta Unit, since the known and inferred faults and seismic areas are generally in Washington County or near the Washington-Monroe County line (Ohio Department of Natural Resources, 2014).

Therefore, Protesters arguments as to BLM’s failure to address potential impacts of hydraulic fracturing on public health and safety, air quality, risks to water resources, and seismic risk, are denied.

C. The BLM failed to adequately address potential impacts to threatened and endangered species, as required by NEPA

Protesters argue “[the Marietta] EA fails to adequately address the potential impacts from the proposed oil and gas leasing on species that are federally designated as threatened or endangered with extinction, including the Indiana bat, Northern long-eared bat, fanshell, pink mucket pearly mussel, sheepnose mussel, and snuffbox mussel” (Pages 24-27). However, the Marietta EA adequately addresses wildlife and special status species.

As to the Indiana bat, the Marietta EA states that there are no documented hibernacula within the Marietta Unit in Ohio (Page 48):

The WNF contains one documented hibernaculum, and it is not on the Marietta Unit...the Athens and Ironton Units most likely contain the most heavily concentrated populations of Indiana bat, based on thorough surveys conducted previously throughout the WNF by the USFWS.

The BLM also adopts in the Marietta EA the 4(d) rule, recently issued by the FWS, to address the newly listed Northern Long Eared bat (Page 19):

More recently, a BO was issued by the USFWS in 2016 for the 4(d) rule for the federally listed, threatened northern long-eared bat. This rule exempts incidental take of northern long-eared bat for federal actions that adhere to certain, basic conservation measures. The USFS operates under this BO and therefore the Proposed Action is also covered under the BO.

For the Northern Long Eared Bat, the Marietta EA clearly states BLM reliance on the 4(d) rule of the USFWS. This rule states that in areas of the bat's range that may be affected by white-nose syndrome, incidental take caused by some tree removal and tree-clearing activities, does not need to be prohibited to conserve the bat if conservation measures that protect the bat's most vulnerable life stages are taken. Specifically, the Marietta EA states (Page 100):

The USFS activities fall under the 4(d) rule that exempts incidental take of northern long-eared bat, provided those activities adhere to certain, basic conservation measures to protect hibernacula and roost trees.

As to Aquatic Species, the Marietta EA states (Page 49):

Fanshell and pink mucket pearlymussel are not documented anywhere on the WNF... Sheepnose and snuffbox may be present on waterways within the WNF and were not included in the 2005 BO, but the USFWS concurred with the USFS that the 2012 SIR did not need any update regarding these species because neither of these species would be affected by oil and gas activities on the national forest.

Furthermore, the protective measures attached to a lease provide the prospective lessee notice that protection of those species must be taken into consideration if an application for permit to drill is submitted to the BLM. Additional consultation with the US Fish and wildlife Service would be required at that time.

Therefore, Protesters' arguments that BLM failed to address threatened and endangered species in the Marietta EA are denied.

D. BLM failed to account for the cumulative impacts of private surface development and fracking projects on the Ohio River and other related infrastructure projects

The Protesters argue that the EA fails to address forest-wide, site specific, and cumulative effects

of spills and infrastructure within and near the nominated WNF parcels (Pages 28-30). In connection to spills the Protesters mention the Rover Pipeline, which, according to the parties, will run directly adjacent to segments of the WNF with leasing.

However, the Marietta EA adequately included all known projects into its cumulative analysis. For this the Marietta EA used all available knowledge of projects disclosing them as follows (Page 121):

- Approval of an electric line that crosses 600 feet of NFS lands, 2009;
- Habitat improvement for yellow-fringed orchid on 38.5 acres using a variety of mechanical and chemical treatments and minor construction activities, 2010;
- Approval of three oil and gas wells, 2010;
- Renewal of two miles of electric pipeline permits, ranging in width from 15 to 80 feet, 2010
- Renewal of 61 acres of hay and row-crop cultivation and 114 acres of grazing, most of which is in river corridor management area, 2010;
- Renewal of permits for 3,300 feet of road access, 2010;
- Mechanical treatments on managed openings, 2011;
- Habitat management, including 564 acres of early successional habitat creation, 432 acres of alleged stands using single-tree and group selection, and 870 acres of prescribed burning, 2011;
- Approval of an Application for Permit to drill a vertical oil and gas well on a 0.74-acre pad with a 250-foot access road, 2013;
- Plugging and abandonment of six orphaned wells, 2014;
- 4.4-mile expansion of Kinderhook equestrian trail, 2015; and
- Approval of a 150-foot-by-10-foot ATV trail to service an oil and gas well, 2015.

In addition to the projects listed above, the cumulative effects analysis also considers recent past, ongoing, and reasonably foreseeable mineral development (private and federal) within the Marietta Unit. As of 2015, there were 285 federal wells in Washington County, 117 federal wells in Monroe County, and none in Noble County. There were a total of 790 active wells on private lands in the Wayne National Forest.

Also, pipelines and other infrastructure on the parcels would require surface development, which would not occur until the Application for Permit to Drill has been submitted. Any additional Conditions of Approval (COAs) can be added at this time as the Marietta EA states on Page 125:

Despite the potential for cumulative effects...reclamation and other stipulations and best management practices, as described earlier in this EA, would help to minimize the potential for significant adverse cumulative effects.... Additional protections may be applied at the

APD stage.

Therefore, the Protesters' argument that BLM failed to account for spill risks are denied, since any new project, including the, still under construction, Rover Pipeline, is not expected to have a significant impact that may shift the Finding of No Significant Impact because of the establishment of future COA's on top of the mitigation measures and Best Management Practices for the proposed action as described on Pages 94-96:

The BLM encourages industry to incorporate and implement BMPs to reduce impacts to air quality through reduction of emissions, surface disturbances, and dust from field production and operations... Additionally, the BLM encourages oil and natural gas companies to adopt proven, cost-effective technologies and practices that improve operational efficiency and reduce natural gas emissions. In October 2012, USEPA promulgated air quality regulations for completion of hydraulically fractured gas wells (USEPA, 2015b). These rules required air pollution mitigation measures that reduced the emissions of volatile organic compounds during gas well completions. Mitigation included utilizing a process known as a "green" completion in which natural gas brought up during flowback is captured in tanks rather than in open fluid pits. Among other measures to reduce emissions include the USEPA's Natural Gas STAR program.

E. The EA fails to demonstrate conformity with the Clean Air Act (CAA)

The Protesters argue that the EA fails to demonstrate conformity with the Clean Air Act within and near the nominated WNF parcels (Pages 30-33).

Sections 3.2 and 4.2 in the Marietta EA discuss the potential sources of air emissions associated with reasonably foreseeable future oil and gas development in the Marietta Unit as well as the potential effects of those emissions. For example, Section 4.2.1 of the EA discloses that there are various sources of air emissions from potential mineral development, including VOCs, methane, fugitive emissions, and emissions associated with hydraulic fracturing. As stated in Section 4.3.8.1 (Federally endangered or threatened species), the USFS would require the use of closed-loop systems (i.e., tanks instead of open pits); however, evaporation pits may be used on private land in compliance with Ohio regulations. The air quality analysis in the Marietta EA include quantified estimates of potential air emissions from the production and pre-production phase of potential oil and gas development. The climate change sections of the EA (Sections 3.2.5 and 4.2.3) also include a quantification of potential greenhouse gas emissions associated with potential future mineral development and how it relates to climate change. Section 4.2.4 of the EA includes a list of best management practices, standard operating procedures, and mitigations for minimizing air emissions. Operators are required to ensure their actions do not violate any federal or state air quality standards. As the Interior Board of Land Appeals (IBLA) determined in Powder River Basin Resource Council, 183 IBLA 83, 95 (December 21, 2012), "BLM properly may rely on the state, which is subject to oversight by the USEPA, to ensure permitted activities do not exceed or violate any State or Federal air quality standard under the Clean Air Act (CAA)." Section 3.2.1 of the Final EA explains the various Ohio laws implementing the CAA. The BLM has taken the requisite "hard look" at air quality in compliance with NEPA, utilizing data that is available at the leasing stage. Further detailed NEPA analysis, including air quality analysis, would be conducted at the Application for Permit to Drill (APD) stage when specific design details are known.

Therefore, the Protesters' argument that BLM failed to demonstrate conformity with the Clean Air Act within and near the nominated WNF parcels is denied.

F. BLM violated Section 7 by failing to consult with the FWS on the Impacts of the Proposed Oil and Gas Leasing on Threatened and Endangered Species

Protesters argue that "BLM violated the ESA by failing to consult with FWS concerning the impacts of its oil and gas leasing proposal on listed species" (Pages 33-35). The USFS and BLM have consulted with the FWS multiple times as the respective agencies have analyzed the potential for oil and gas leasing within the Marietta Unit of the Wayne National Forest.

The Marietta EA details the timelines of the various Section 7 consultations (Pages 18-19):

The USFS completed a Biological Evaluation (BE) and the USFWS issued its Biological Opinion (BO) on November 22, 2005. The BO established a tiered approach to the Section 7 consultation. The programmatic (Tier I) BO (November 22, 2005) covers all the activities described in the 2006 Forest Plan/EIS at a programmatic, non-site-specific level. Because the BLM was a cooperating agency in the 2006 Forest Plan and EIS, the consultation conducted with respect to the 2006 Forest Plan and EIS applies to the Proposed Action analyzed in this EA... As part of the 2012 SIR, the USFS reviewed new information related to hydraulic fracturing and whether there could be additional effects to threatened and endangered species that had not been previously analyzed in the 2006 Plan/ EIS. The USFS and the USFWS concluded that no further analysis or consultation was needed and that the consultation conducted under the 2006 Plan/EIS was still valid. As the BLM analyzes individual projects pursuant to the Forest Plan, the BLM is responsible for reinitiating consultation and providing the USFWS with additional information; this process is called Tier II consultation.

...Since the BLM was a cooperating agency it can adopt the consultations included within the Plan as their 2012 revision done for their 2012 SIR.

...the BLM would submit a Tier II Biological Assessment to the USFWS when it receives an APD, if it determines that potential effects to critical habitat, fish or wildlife could occur. The Marietta EA adequately addresses Section 7 of the ESA and the rationale is (Pages 19-20):

In addition, the BLM worked directly with the FWS to identify the species to be considered for potential leasing within the Marietta Unit. As a result of that informal consultation, the BLM NSD prepared a Biological Assessment (BA). The BA concluded that proposed oil and gas leasing was not likely to adversely affect the threatened and endangered species identified by the FWS, as further discussed below.

Therefore, Protesters' argument that BLM violated Section 7 of the ESA for failing to consult with FWS is denied.

G. BLM's Reliance on the 2005 Biological Opinion violates the ESA

Protesters argue that "BLM's reliance on the 2005 Biological Opinion is misplaced because it is out of date" (Pages 35-40). However, as the Marietta EA states, USFS reasonably decided

consultation was not necessary in light of the information provided in the 2012 SIR (Page 173):

The 2012 SIR was completed to determine if the 2006 Forest Plan/EIS needed to be updated in light of new information regarding hydraulic fracturing. The USFS determined that the potential effects associated with hydraulic fracturing and horizontal drilling were not significantly different from those of vertical drilling and that the mitigation measures in place for vertical drilling would suffice for horizontal drilling/hydraulic fracturing.

As to BLM's role in this analysis, the Marietta EA explains (Page 177):

BLM was a cooperating agency on the 2006 Forest Plan/EIS and provided input for the 2012 SIR. Both the USFS and BLM concurred that no further analysis or Endangered Species Act consultation was needed at this stage.

On November 4, 2015, a letter containing a BLM prepared Biological Assessment (BA) was sent to FWS by the NSD. The conclusion of the Biological Assessment was that proposed leasing, with the protective measures incorporated into the lease terms, was not likely to adversely affect the Northern long-eared bat, Indiana bat, Fanshell mussel, Snuffbox mussel, Sheepnose mussel, Pink mucket pearly mussel, American Burying beetle, Northern monkshood, Running buffalo clover, Small whorled pogonia, and the Virginia spirea. The protective measures outlined in the BLM's Biological Assessment incorporated stipulations and notices found in the US USFS 2006 LRMP/EIS and associated Biological Opinion, plus additional measures for protection of Northern long-eared bat hibernacula and requirements to keep wildlife out of tanks.

Consistent with the ESA regulations and guidance outlined in the US USFS 2006 LRMP/EIS and associated Biological Opinion, the BLM and US USFS would prepare and submit a Tier II Biological Assessment if, subsequent to leasing, an application for permit to drill is filed with the BLM. Again, the protective measures attached to a lease provide the prospective lessee notice that protection of those species must be taken into consideration if an application for permit to drill is submitted to the BLM. Additional consultation with the US Fish and wildlife Service would be required at that time.

Therefore, Protesters' arguments BLM's reliance on the 2005 Forest Plan Biological Opinion is misplaced, and consultation must be reinitiated, are denied.

DECISION

After a careful review, it has been determined that all of the protested Subject Parcels as described in the December Sale Notice may be offered at the December Lease Sale. The protests to all Lease Sale Parcels are denied for the reasons described above.

You may appeal this decision to the Interior Board of Land Appeals, Office of the Secretary, in accordance with the regulations contained in 43 CFR, Part 4 and the attached Form 1842-1 (Attachment 2). If you file an appeal, your notice of appeal must be filed in the BLM Eastern States Office, 20 M Street SE, Suite 950 Washington, D.C. 20003, within 30 days from receipt of this decision. You have the burden of showing that the decision appealed from is in error.

If you wish to file a petition (pursuant to regulation 43 CFR 4.21) (request) for a stay (suspension) of the effectiveness of this decision during the time that your appeal is being reviewed by the

Board, the petition for a stay must accompany your notice of appeal. A petition for a stay is required to show sufficient justification based on the standards listed below. Copies of the notice of appeal and petition for a stay must also be submitted to each party named in this decision and to the Interior Board of Land Appeals and to the appropriate Office of the Solicitor (see 43 CFR 4.413) at the same time the original documents are filed with this office. If you request a stay, you have the burden of proof to demonstrate that a stay should be granted.

Standard for Obtaining a Stay

Except as otherwise provided by law or other pertinent regulation, a petition for a stay of a decision pending appeal shall show sufficient justification based on the following standards:

- (1) The relative harm to the parties if the stay is granted or denied,
- (2) The likelihood of the appellant's success on the merits,
- (3) The likelihood of immediate and irreparable harm if the stay is not granted, and
- (4) Whether the public interest favors granting the stay.

Please contact Elena Fink (Deputy State Director, Natural Resources) at (202) 912-7730 or Nicole Virella (Planning & Environmental Specialist) at (202) 912-7739 with any further questions or concerns.



Mitchell Leverette
Acting State Director